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# Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?

PHILIPPA M. GUTHRIE\*

The policy of this Administration is 'zero tolerance.' No amount of drug use is acceptable. And, zero tolerance should be the policy of every state in the Union—of every county and town, of every school, business, and community group—in fact, of every American.<sup>1</sup>

## INTRODUCTION

Fighting drug abuse in America is a top government priority. President Bush recently proposed allocating \$10.6 billion in federal funds<sup>2</sup> to wage war against a drug problem that reportedly costs the United States up to \$100 billion a year.<sup>3</sup> Additionally, in the past six years Congress has passed four major bills that were specifically aimed at or included provisions for battling the drug problem.<sup>4</sup> The intensity of this campaign is particularly evident in the latest bill, the Anti-Drug Abuse Act of 1988.<sup>5</sup> In that Act, Congress provided for eviction of public-housing tenants who are involved with drugs,<sup>6</sup> denial of federal benefits such as loans, contracts and licenses to convicted drug possessors,<sup>7</sup> and the establishment of a demonstration program to drug test criminal defendants.<sup>8</sup>

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1. George Bush, *Building a Better America*, Supplement to the Message Delivered to the Joint Session of the Congress 66 (Feb. 9, 1989).

2. Fessler, *Bush's \$10.6 Billion Strategy Targets Enforcement Again*, CONG. Q., Jan. 27, 1990, at 242. Senator Joseph Biden, Jr., chairman of the Senate Judiciary Committee, proposed an alternative plan for \$14.7 billion in anti-drug expenditures. Spending for anti-drug activity in 1989 surpassed \$9.4 billion. *Id.*

3. See Anti-Drug Abuse Act of 1988, § 5251(a)(2), 21 U.S.C. § 1502 note (1988).

4. Biskupic, *Bush's Anti-Drug Campaign Emphasizes Enforcement*, CONG. Q., Sept. 9, 1989, at 2314. The bills are: the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C. (1988)); the Department of Defense Appropriations Act of 1989, Pub. L. No. 100-463, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2270-16 (a defense bill which included appropriations of \$300 million for drug interdiction activities); the \$1.7 billion Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C. (1988)); and the Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of U.S.C.) (an anti-crime bill that included several provisions directed at drug traffickers).

5. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C. (1988)).

6. Anti-Drug Abuse Act of 1988, § 5101, 42 U.S.C.A. § 1437(d)(1)(5) (1990).

7. *Id.* at § 5301, 21 U.S.C. § 853(a) (1988).

8. *Id.* at § 7304, 18 U.S.C. § 3154 note (1988).

The federal government is not alone in the war against drugs. Local and state governments across the country have taken such anti-drug measures as confiscating Medicaid and food stamp cards from people arrested, but not convicted, on drug charges;<sup>9</sup> arresting individuals who gather in groups of two or more and "[fail] to move on";<sup>10</sup> and stopping cars that fit drug-courier profiles to perform warrantless searches.<sup>11</sup> Other more extreme alternatives, such as one for public whipping, and another to restrict gang members to their homes for all but five minutes a day, have also been proposed.<sup>12</sup>

Many Americans are deeply concerned about drugs and support aggressive tactics. A recent poll of young professionals, for example, revealed that 26% of respondents were worried about serious drug use by someone close to them.<sup>13</sup> Additionally, a Washington Post/ABC News poll showed that 52% of those surveyed were willing to have their homes searched, 67% were willing to have their cars stopped and searched without a warrant, 55% favored mandatory drug testing of all people and 67% favored drug testing for all high school students.<sup>14</sup>

In the face of such battle fever, there is always a danger that the government may amass and unleash an arsenal that undermines constitutionally protected rights such as the fourth amendment guarantee against unreasonable searches and seizures.<sup>15</sup> Indeed, just such claims finally brought the Supreme Court into the fray. In *Skinner v. Railway Labor Executives' Association*<sup>16</sup> and *National Treasury Employees Union v. Von Raab*,<sup>17</sup> the Supreme Court upheld drug testing of railroad and customs employees without warrants, probable cause or individualized suspicion.<sup>18</sup> These decisions were particularly troubling because of the intrusiveness of the anti-drug weapon at issue.<sup>19</sup> They also signified the Court's readiness to abandon

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9. N.Y. Times, Oct. 16, 1989, at A1, col. 1, B10, col. 2 (police activity in Lawrence, Massachusetts).

10. *Id.* at A1, col. 2, B10, col. 2 (anti-loitering law in the District of Columbia).

11. *Id.* at B10, cols. 3-4 (police activity in Volusia County, Florida).

12. *Id.* at A1, cols. 1-2 (Whipping was proposed in the Delaware State Senate; restricting gang members to their homes was proposed in Los Angeles.).

13. Eisenach, *How to Win the War on Drugs: Target the Users*, USA Today, Jan. 1989, at 46, col. 1.

14. Wicker, *Rights vs. Testing*, N.Y. Times, Nov. 28, 1989, at A25, col. 5.

15. U.S. CONST. amend. IV.

16. 109 S. Ct. 1402 (1989).

17. 109 S. Ct. 1384 (1989).

18. *Id.* at 1397; *Skinner*, 109 S. Ct. at 1422.

19. See, e.g., *Skinner*, 109 S. Ct. at 1422 (Marshall, J., dissenting) (emphasis added) ("[T]he issue here is whether the Government's deployment in that [drug] war of a *particularly draconian weapon* comports with the Fourth Amendment."). Subpart D of the Federal Railroad Administration regulations provides that if the normally specified urine and breath tests are to be used in a disciplinary hearing, the employee must be allowed to provide a blood sample as well. If the employee declines to provide a blood sample, the railroad may presume impairment from a positive urine test. *Id.* at 1410. No one could seriously argue that a procedure to withdraw bodily fluids with a needle is not intrusive.

its presumed role of dispassionate arbiter and to join the legislative and executive branches in the crusade to eliminate the drug scourge.

One issue which the Supreme Court may have to consider before the drug war is over is whether welfare benefits<sup>20</sup> can be denied because of a recipient's drug use. Congress has already demonstrated its willingness to hinge eligibility for some government benefits, including public housing,<sup>21</sup> on drug involvement. In addition, two recent legislative proposals, one of which would have required drug testing, have surfaced to condition or to deny subsistence benefits in this fashion.<sup>22</sup> Governmental attempts to reform welfare by eliminating drug abuse may be well-intentioned<sup>23</sup> given the costs of public assistance programs<sup>24</sup> and the extent of the drug problem among some segments of the poor.<sup>25</sup> Yet, although welfare benefits have been variously conditioned in the past,<sup>26</sup> conditioning them on passing a drug test is a new and vexing idea. Aside from raising moral and political issues, any program to deny welfare benefits based on drug testing is certain to encounter constitutional challenges.

This Note argues that the Supreme Court, despite its recent rulings in *Skinner* and *Von Raab*, should not uphold a measure conditioning welfare benefits on passing a drug test. Part I briefly discusses rationales for welfare and outlines the current state of the law regarding welfare benefits and drug use. Part II analyzes the recent Supreme Court rulings on drug testing

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20. The term "welfare" is most closely identified with the Aid to Families with Dependent Children ("AFDC") program. For an informative discussion of the AFDC program and how it came to be known as "welfare," see generally Cotter, *Twenty Years of Welfare Reform: An Insider's View*, in *REFORMING WELFARE: LESSONS, LIMITS, AND CHOICES* 15 (R. Coughlin ed. 1989) [hereinafter *REFORMING WELFARE*]; and S. LEVITAN, *PROGRAMS IN AID OF THE POOR* 31-39 (1985). In common parlance, other general subsistence benefits are often referred to as welfare. For ease of discussion and unless otherwise indicated, the term "welfare" is used in this analysis to encompass AFDC as well as other general assistance programs.

21. See Anti-Drug Abuse Act of 1988, § 5101, 42 U.S.C.A. § 1437(d)(1)(5) (1990).

22. See H.R. 1720, 100th Cong., 1st Sess. § 809 (1987); H.R. 1303, Reg. Sess., La. (1989). The latter bill was proposed by Louisiana State Representative David Duke.

23. Both proposals purported to aid welfare reform by eliminating drug use and thereby reducing welfare dependency. See H.R. REP. NO. 159, 100th Cong., 1st Sess., pt. 1, at 1, 37 (1987) (House Committee on Ways and Means report discussing the purpose of the Family Welfare Reform Act); H.R. 1303, Reg. Sess., La. (1989).

24. Federal AFDC expenditures alone totaled \$16.8 billion in federal and state money in 1988. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE U.S.* 368 (Table No. 610) (1990) [hereinafter *STATISTICAL ABSTRACT*].

25. B. Frank & W. Hopkins, *Current Drug Use Trends in New York City*, New York State Division of Substance Abuse Services, Bureau of Research and Evaluation 2 (Dec. 1988) (copy of unpublished report on file with the *Indiana Law Journal*); Adler, *Hour by Hour Crack*, *NEWSWEEK*, Nov. 28, 1988, at 64.

The author recognizes that chronic drug use afflicts all socio-economic classes, not just economically disadvantaged groups.

26. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a ceiling on the total dollar amounts of AFDC grants per family); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (upholding the validity of a statute denying welfare benefits to state residents of less than a year).

and discusses their implications if the issue arises in a welfare benefits case. Part III explores the kinds of constitutional arguments available to a welfare recipient challenging a drug testing law. This Note concludes that conditioning subsistence benefits on drug testing would be inexpedient, and may be unconstitutional.

## I. BACKGROUND

### A. *Welfare*

Poverty and aid to the poor are not modern phenomena. The Old Testament proclaimed, "For the poor shall never cease out of the land: therefore thou shalt open thine hand wide unto thy brother."<sup>27</sup> The idea of the federal government acting as chief benefactor, however, is a comparatively recent concept. Prior to the New Deal, local and state governments and private organizations took care of society's needy. The Social Security Act of 1935 began the shift toward federally funded poverty programs that yielded the modern welfare system.<sup>28</sup> Today Americans accept, and from all indications support, most social programs offered by the federal government.<sup>29</sup>

Although there now may be broad non-partisan support for both state and federal aid to the poor, there is not agreement as to the design or the extent of government poverty programs. Hence, welfare reform is continually on the public agenda, with proposals offered to achieve goals ranging from helping the destitute achieve self-sufficiency to reducing welfare costs.<sup>30</sup>

There are jurisprudential as well as practical underpinnings to these persistent calls for welfare reform. At odds with the belief that "a good society should help the needy, and that the government should have sound poverty programs"<sup>31</sup> is the idea that subsistence benefits, typically defined as basic elements of survival like food, housing and medical assistance, are

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27. *Deuteronomy* 15:11 (King James).

28. See WITH CHARITY FOR ALL (M. Ierley ed. 1984) (tracing the history of aid to the poor from ancient times to the present); Cotter, *supra* note 20, at 15.

29. See Harpham & Scotch, *Ideology and Welfare Reform in the 1980's*, in REFORMING WELFARE, *supra* note 20, at 54; Moon, *Introduction*, in RESPONSIBILITY, RIGHTS, AND WELFARE, at 1-2, 13 (J.D. Moon ed. 1988). The various authors in *Responsibility, Rights, and Welfare* posit that the welfare state endures despite constant criticism because it expresses our "deepest values," *id.* at 13, and convictions about addressing poverty and "social dislocation." *Id.* at 1.

30. See WELFARE REFORM, CONSENSUS OR CONFLICT? xv-xvii (J.S. Denton ed. 1988); National Governors' Association, *Policy on Welfare Reform*, in REFORMING WELFARE, *supra* note 20, at 201.

31. Novak, *On Social Intervention: Some Reflections on the Relationship Between Family and Poverty*, 1979 WASH. U.L.Q. 61, 63.

not constitutionally required.<sup>32</sup> Legislators merely choose to make welfare available to eligible recipients out of moral compunction and could legally vote subsistence benefits out of existence. This absence of a constitutional grounding leaves welfare in legal limbo. Consequently, the debate over whether there should be a judicially protected "right" to welfare rages, with each side boasting eminent scholars.<sup>33</sup> The controversy is important because if there is no right to welfare, "[t]here is no legal cause of action for the want of benevolence."<sup>34</sup>

Since there is no clear constitutional provision on which to ground a right to welfare, it is theoretically a government benefit that can be conditioned or rescinded. Although rescission of welfare altogether seems unlikely, conditioning eligibility on drug testing is a plausible next step in the drug war. A look at the current state of legislation in this area demonstrates how close we are to taking that step.

### *B. Existing Laws and Recent Proposals to Condition Welfare Benefits Based on Drug Use*

The Anti-Drug Abuse Act of 1988<sup>35</sup> sets the stage for Congress' conditioning government benefits on drug testing. The stated purpose of the Act is "to prevent the manufacturing, distribution, and use of illegal drugs . . . ."<sup>36</sup> The Act approaches the task from several angles, including establishing the Office of National Drug Control Policy<sup>37</sup> and setting guidelines for drug education, treatment, prevention and law enforcement. Title V of the Act lists Congress' findings about drug use in the United States. One section states, for example, that 23 million Americans and over 25 percent of all high school seniors use illicit drugs at least monthly, and that 10 to 15 percent of all highway fatalities involve drug use.<sup>38</sup> These statistics lay the foundation for the concluding section: "It is the declared policy of the United States Government to create a Drug-Free America by 1995."<sup>39</sup>

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32. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201; Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

33. For arguments in favor of welfare rights, see Michelman, *supra* note 32; and Reich, *The New Property*, 73 YALE L.J. 733 (1964). For arguments against welfare rights, see Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; and Epstein, *supra* note 32. For a thorough analysis of the philosophical theory behind welfare rights, see C. WELLMAN, *WELFARE RIGHTS* (1982).

34. Epstein, *supra* note 32, at 204.

35. Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C. (1988)).

36. Anti-Drug Abuse Act of 1988 preamble, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C. (1988)).

37. *Id.* at § 1002, 21 U.S.C. § 1501(a) (1988). William Bennett was the first Director of National Drug Control Policy.

38. *Id.* at § 5251(a), 21 U.S.C. § 1502 note (1988).

39. *Id.* at § 5251(b), 21 U.S.C. § 1502 note.

Immediately following the declared drug-free policy, the Act denies federal benefits to convicted drug possessors for up to one year, first-time drug traffickers for up to five years and third-time traffickers permanently.<sup>40</sup> Section 5301(d) defines deniable benefits as including grants, contracts, loans and professional or commercial licenses, but excluding welfare and public housing.<sup>41</sup>

Section 5101,<sup>42</sup> however, provides that a public housing tenant may be evicted if the tenant, a member of the tenant's family, or a guest or other person under the tenant's control is involved in "drug-related criminal activity."<sup>43</sup> This provision illuminates a puzzling inconsistency in Title V. Section 5101 permits eviction from public housing for simply being involved with drugs, even if the individuals have not been arrested or convicted on any drug-related charges.<sup>44</sup> However, section 5301, which denies other federal benefits, only applies to convicted drug offenders, and will not permit denial of public housing.<sup>45</sup> Logic dictates that convicted drug offenders be denied public housing before individuals who have not been convicted. Congressional lawmakers, however, apparently saw things in a different way. This incongruity leaves open the possibility that welfare benefits might also be denied to individuals who are involved with drugs but have not been convicted.

In fact, two approaches, the carrot and the stick, have been used in past unsuccessful attempts to condition welfare benefits based on drug use. In 1987 the House of Representatives approved its Family Welfare Reform Act.<sup>46</sup> Section 809 of the Act provided for the denial of benefits to any welfare recipient who had withdrawn from a treatment program before its completion. The recipient could become eligible for benefits again upon reentering treatment, or upon a "medical determination" that he or she was drug free.<sup>47</sup> The section was dropped in the joint committee before

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40. *Id.* at § 5301(a)-(b), 21 U.S.C. § 853a (1988).

41. *Id.* at § 5301(d), 21 U.S.C. § 853a.

42. *Id.* at § 5101, 42 U.S.C.A. § 1437(d)(1)(5) (1990).

43. *Id.*

44. *Id.*

45. *Id.* at § 5301, 21 U.S.C. § 853a.

46. H.R. 1720, 100th Cong., 1st Sess. (1987).

47. *Id.* at § 809. Although § 809 did not call explicitly for drug testing, its requirement of a "medical determination" that the recipient is drug free before restoring benefits certainly implicates drug testing. Ironically, if this section had passed, it almost assuredly would have driven welfare recipients away from drug treatment. Treatment programs are notoriously difficult and have extremely high dropout rates. See Isikoff, *Relapse Rates Undermine Enthusiasm for Traditional Drug Treatment*, Washington Post, Aug. 20, 1990, at A6, col. 1; Interview with Chris Pelicano, Public Affairs Director for Phoenix House Drug Treatment Center, in New York City (Aug. 11, 1989) (citing dropout rates of 40%, usually within the first 90 days). Drug addicts at risk of losing their benefits if they drop out of a rehabilitative program will not enter the program in the first place.

passage by the Senate of the revised Family Support Act of 1988.<sup>48</sup> However, that the House passed the proposal indicates that there is considerable support among legislators for tying welfare eligibility to drug use.

The Louisiana legislature contemplated a more punitive approach. Proposed Louisiana House Bill 1303<sup>49</sup> identified the government interests at stake as: "promoting the safety and welfare of children and adults," ensuring that "a major portion of the state's population" is "free of the physical and mental impairments associated with drug dependence" and "providing safeguards to eliminate the misappropriation of entitlement benefits."<sup>50</sup> The bill provided that all adults in public assistance programs be tested for drugs, and that individuals with positive test results be suspended from benefits programs until they completed education and rehabilitation programs and passed follow-up drug tests.<sup>51</sup> The bill was not passed by the Louisiana legislature; nevertheless, it offers further evidence that public servants are actively seeking ways to both curb drug use among welfare recipients and reduce welfare costs.

One difficulty with these proposals is that the solutions advanced may not remedy the problems. First, denying welfare to drug users will only eliminate that class of substance abusers from the welfare rolls; it will not eliminate drug use and crime among the destitute. It seems senseless to make poor drug addicts suddenly poorer and, therefore, more desperate to commit income-generating crimes.<sup>52</sup> Instead, policy-makers should couple the threat of denial of welfare benefits with immediate access to drug treatment, otherwise they will create a truly wretched underclass.<sup>53</sup>

Second, although legislators could deny welfare benefits based on drug use without employing testing, drug testing is the most accurate and even-handed means of assuring that a recipient is actually using drugs.<sup>54</sup> The

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48. Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

49. H.R. 1303, Reg. Sess., La. (1989).

50. *Id.*

51. *Id.*

52. Though this is a controversial assertion, there is data showing that drug abusers commit crimes to support their addictions. See Chambers, *Narcotic Addiction and Crime: An Empirical Review*, in *DRUGS AND THE CRIMINAL JUSTICE SYSTEM* 125-42 (J. Inciardi & C. Chambers eds. 1974); Gould, *Crime and the Addict: Beyond Common Sense*, in *id.* at 57-73; Weissman, *Understanding the Drugs and Crime Connection*, in *CRIMINAL JUSTICE AND DRUGS* 55, 72 (J. Weissman & R. DuPont eds. 1982); Marriott, *Addicts Awaiting Treatment Often Face Delays and Panic*, N.Y. Times, Jan. 10, 1990, at A1, col. 5.

53. The Louisiana bill did provide that recipients who tested positive be enrolled in counseling and rehabilitation programs. Unfortunately, the number of available drug-treatment slots in most areas of the country is woefully inadequate. See Marriott, *supra* note 52, at A1, col. 5; Telephone interview with John Sheehan, Director of Substance Abuse Treatment at Covenant House, in New York City (Aug. 2, 1989).

54. The accuracy of drug tests is questionable. There are several factors to consider in evaluating tests, including the testing method used, where and by whom the tests are done,



Supreme Court acknowledged in both *Skinner*<sup>55</sup> and *Von Raab*<sup>56</sup> that visually detecting impairment can be extremely difficult even for a physician,<sup>57</sup> especially when an alleged user is seen infrequently.<sup>58</sup> Without drug testing, the government would have a more difficult burden of proof in administrative hearings.

Third, although reliance on positive drug tests might promise to streamline procedural hearings, claims of administrative efficiency would be misleading. The potentially huge number of affected recipients<sup>59</sup> and the possibility of testing errors<sup>60</sup> might actually increase appeals and litigation. The administrative costs could create an organizational nightmare.<sup>61</sup>

Thus, while ridding the welfare population of drug use is a worthy goal, the need to rely on testing may be problematic. The Supreme Court has only delivered two opinions on drug testing, and both cases concerned specialized classes of individuals.<sup>62</sup> Analysis of these cases is a prerequisite to predicting how the Supreme Court might react to a program for drug testing welfare recipients.

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the chain of custody of the specimen, the inherent methodological unreliability and whether or not initial test results are confirmed. See *Employment Testing: A National Report on Polygraph, Drug, AIDS, and Genetic Testing* (UPA), at D:9-11 (1987) [hereinafter *Employment Testing*]. Makers of commercially marketed immunoassay tests, the most commonly used types of tests in mass drug testing programs, boast accuracy rates of 97-99%. However, scientific studies have reported immunoassay false positive rates as high as 37% for certain classes of drugs. *Id.* at D:9 (citing Holzman, *Promising Drug Test Balances Rights*, *Insight*, June 9, 1986, at 50, cols. 1-2). Data on laboratory accuracy rates are also conflicting. A 1985 report in the *Journal of the American Medical Association* found that laboratories with government contracts were wrong up to 100% of the time when testing urine specimens; however, the Navy claims that it did not have one false positive in the first three years of its testing program. *Id.* at D:10. Other studies have reported a general laboratory error rate of between 3% and 20%. *Id.* Whatever the real error rates, even a 1% error rate means that 1% of welfare recipients, approximately 109,000 people, might be improperly denied benefits. See *STATISTICAL ABSTRACT*, *supra* note 24 at 368 (Table No. 610) (reporting 10.9 million AFDC recipients in 1988).

55. 109 S. Ct. 1402 (1989).

56. 109 S. Ct. 1384 (1989).

57. *Skinner*, 109 S. Ct. at 1419.

58. *Von Raab*, 109 S. Ct. at 1395.

59. In 1988, for example, there were 10.9 million federal AFDC recipients who would have needed to have been tested. *STATISTICAL ABSTRACT*, *supra* note 24, at 368 (Table No. 610). It is impossible to tell how many of these might have tested positive for drugs.

60. See *supra* note 54.

61. The costs of the tests alone range from a few dollars per test for immunoassays to \$30 to \$75 per test for the more sophisticated gas chromatography/mass spectroscopy method. *Employment Testing*, *supra* note 54, at D:8-9. Cost has already figured in some debates over drug testing. President Bush requested that states initiate drug testing programs in their criminal justice systems in order to receive federal criminal justice funds, but Congress has not acted on the proposal, largely because states have balked at the costs of such programs. See Fessler, *supra* note 2, at 243.

62. *Skinner* concerned railroad employees involved in accidents or other safety incidents. 109 S. Ct. 1402. *Von Raab* dealt with U.S. Customs Service employees who were involved in front line drug interdiction, carried weapons or handled classified material. 109 S. Ct. 1384.

## II. DRUG TESTING: RECENT SUPREME COURT RULINGS

The government's use of urine and blood testing as anti-drug weapons has increased rapidly in recent years. The bulk of expansion occurred in the employment arena, with the government using tests to reduce and deter drug use among government workers.<sup>63</sup> Despite their apparent success,<sup>64</sup> drug testing programs have not gone unchallenged. Lower federal courts have decided a number of cases in the last few years challenging both private and public employers' programs,<sup>65</sup> but none reached the Supreme Court until March of 1989. The companion cases of *Skinner*<sup>66</sup> and *Von Raab*<sup>67</sup> afforded the Court its first opportunity to comment on the issue of drug testing. Although they focus on federal employee testing programs, *Skinner* and *Von Raab* indicate how the Supreme Court might approach drug testing programs in the welfare context.

In *Skinner*, the Court considered Federal Railroad Administration (FRA) regulations mandating that railroads test employees involved in certain accidents,<sup>68</sup> and authorizing testing of employees in other specified circumstances.<sup>69</sup> The regulations required toxicological testing of blood, urine and breath. A majority of the Court denied respondents' claims for an injunction and held that the regulations did not violate the fourth amendment ban against unreasonable searches.<sup>70</sup>

The Court first decided that the fourth amendment applied because the government endorsement and participation was extensive enough to make any private actor who complied with the FRA regulations an agent or instrument of the government.<sup>71</sup> The Court then found that blood and breath tests clearly constituted searches.<sup>72</sup> Urine tests, although lacking the

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63. See Employment Testing, *supra* note 54, at D:1.

64. For example, the Navy claims that its drug testing program reduced drug abuse among personnel under age 25 from 47% in 1981 to 10% in 1984. *Id.* Private industry testing programs have claimed similar results. *Id.*

65. See, e.g., 2 Empl. Testing Biweekly Rep. (UPA) No. 17, at BWR:291, BWR:294 (Oct. 15, 1988) (citing 16 cases); 3 Empl. Testing Biweekly Rep. (UPA) No. 5, at BWR:361-62 (Apr. 15, 1989) (citing 10 cases).

66. 109 S. Ct. 1402 (1989).

67. 109 S. Ct. 1384 (1989).

68. The mandatory testing provision, subpart C, applies to employees involved in "major train accidents," which are defined as accidents involving either a fatality, the release of hazardous material accompanied by an evacuation or reportable injury, or damage to railroad property of at least \$500,000. 49 C.F.R. § 219.201(a)(1) (1989); see *Skinner*, 109 S. Ct. at 1408-09.

69. The permissive testing provision, subpart D, is applicable after a reportable accident or incident (when a supervisor has reasonable suspicion that an employee was at fault) or after a violation of certain safety rules. 49 C.F.R. § 219.301(b)(2)-(b)(3) (1989); see *Skinner*, 109 S. Ct. at 1409-10.

70. *Skinner*, 109 S. Ct. at 1422.

71. *Id.* at 1411.

72. *Id.* at 1412-13.

invasiveness of surgical procedures, nevertheless were also deemed searches that intruded sufficiently upon reasonable societal expectations of privacy.<sup>73</sup>

Second, the Court looked at the reasonableness of the search. To assess this factor, the Court balanced the infringement of the fourth amendment right against the promoted government interest and held that the intrusion on the employees' privacy was outweighed by the importance of the government interest in ensuring railroad safety.<sup>74</sup> The majority then dispensed with the usual fourth amendment requirements of warrant, probable cause and reasonable suspicion in a rather bold departure from established fourth amendment doctrine.<sup>75</sup> The requirement of a warrant has been frequently waived where the intrusion was narrowly limited in its objective and scope,<sup>76</sup> and where "the burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search."<sup>77</sup> Such circumstances, called "special needs,"<sup>78</sup> were deemed present in *Skinner*, and therefore, no warrant was necessary.<sup>79</sup>

More surprising is the abrogation of a probable cause or reasonable suspicion requirement, since individualized suspicion has generally been held necessary even when a warrant was not.<sup>80</sup> To circumvent the probable cause requirement, the Court noted that employees regularly undergo the routine kinds of tests in question as part of physical exams, and that moreover, they are participants in a pervasively regulated industry. According to the Court, these factors combine to diminish the employees' expectations of privacy, especially where the concern is for industry safety.<sup>81</sup> The Court then relied on the FRA's argument that an employee's drug impairment may not be otherwise detectable, and therefore, a drug test might afford the only effective method of discovering drug use.<sup>82</sup> Justice Kennedy wrote for the majority: "Though some of the privacy interests implicated . . . reasonably might be viewed as significant in other contexts . . . [e]mployees

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73. *Id.* at 1413.

74. *Id.* at 1421.

75. *Id.* at 1422.

76. *Id.* at 1415.

77. *Id.* at 1416 (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 533 (1967) (citation omitted)).

78. *Id.* at 1414. For a discussion of the evolution of "special needs" exceptions, see *id.* at 1424-26 (Marshall, J., dissenting).

79. *Id.* at 1416.

80. *Id.* at 1416-17.

81. *Id.* at 1417-18. The Court has used a "pervasively regulated industry" exception to the warrant requirement in the past to uphold administrative inspection schemes. See *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (warrantless mine inspections under the Federal Mine Safety and Health Act of 1977 held reasonable under the fourth amendment because of "the pervasiveness and regularity of the federal regulation"). See generally R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 8.2.5 (1985) (discussing administrative inspections and the line of Supreme Court cases culminating in *Dewey*).

82. See *Skinner*, 109 S. Ct. at 1419.

subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”<sup>83</sup>

*Von Raab*, the companion case to *Skinner*, also upheld the constitutionality of a government employee drug testing program. *Von Raab* involved a United States Customs Service program to perform urinalysis tests on agents who were either directly involved in drug interdiction or the enforcement of related laws, required to carry firearms or required to handle classified material.<sup>84</sup> The Court again deemed the prescribed urinalysis a search, and applied the “special needs” exception permitting waiver of the warrant, probable cause or individualized suspicion requirements.<sup>85</sup>

While the opinions are outwardly similar in approach and outcome, there are distinct differences that make it difficult to predict accurately how the Supreme Court will analyze other drug testing schemes. *Skinner* appeared to apply only to employees who “can cause great human loss,” that is, workers on whom large numbers of human lives might depend.<sup>86</sup> It is easy to imagine the kind of harm that an out-of-control train might cause, and *Skinner* seems to limit itself to this or similar circumstances.<sup>87</sup> *Von Raab*, on the other hand, adds to the pool of employees for whom drug testing is justifiable those employees who are involved in drug interdiction, carry firearms or handle classified information. The latter two categories of employees in particular lend themselves to increasingly broad interpretation. As Justice Scalia pointed out in his dissent:

Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards. . . . [T]oday’s holding apparently approves drug testing for all federal employees with security clearances—or, indeed, for all federal employees with valuable confidential information to impart.<sup>88</sup>

In addition, the holding in *Skinner* was based, at least in part, on the fact that the FRA produced extensive data linking drug and alcohol use to

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83. *Id.*

84. *Von Raab*, 109 S. Ct. at 1388.

85. *Id.* at 1397.

86. *See Skinner*, 109 S. Ct. at 1419.

87. *See id.* *Skinner* also specifically mentions “persons who have routine access to dangerous nuclear power facilities” as being appropriately susceptible to drug testing. *Id.* Presumably *Skinner* would apply to any other kinds of employees whose impairment might endanger multiple lives.

88. *Von Raab*, 109 S. Ct. at 1401 (Scalia, J., dissenting). The majority did not actually uphold the Customs Service’s provision allowing testing of employees who handle “sensitive” information. Instead, the majority remanded the case to the Court of Appeals to further clarify the category’s scope. Still, the Court held that when this group of employees is more clearly delineated, testing is permissible. *See id.* at 1397.

serious train accidents.<sup>89</sup> The claim that the FRA testing scheme addressed a real menace to public safety was, therefore, demonstrable. In *Von Raab*, however, evidence of drug use among Customs Service employees or of harmful incidents resulting from employee drug use was scant.<sup>90</sup> In fact, the Commissioner of Customs stated that the program was designed to deter possible future drug use, not to curb an already identified problem.<sup>91</sup> Thus, the nexus between drug use among those tested and serious harm to society, the foundation on which the *Skinner* holding rested, was purely hypothetical in *Von Raab*. The compelling governmental interest identified by the Court in *Von Raab* was not ridding the United States Customs Service of drug users who had caused serious problems in the past, but rather, "preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry."<sup>92</sup> *Von Raab* requires neither proof of any existing drug problem nor evidence that drugs are even likely to cause the harm a testing program is designed to prevent. Rather, the Court assumes that a drug problem exists<sup>93</sup> and seems only to need a showing that the drug testing program is instituted to avoid some serious harm that could be conceivably drug-related.<sup>94</sup>

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89. The *Skinner* opinion begins with a discussion of the proven incidence of alcohol and drug abuse among railroad employees involved in serious accidents. *Skinner*, 109 S. Ct. at 1407-08. In addition, at least one Justice, Scalia, admitted that he joined the *Skinner* majority because of the FRA data linking substance abuse to train accidents. *Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting).

90. See *Von Raab*, 109 S. Ct. at 1394. The majority admitted that only five of 3,600 Customs' employees tested positive for drugs. *Id.* The *Von Raab* dissent also mentioned this paucity of data and the nonexistent connection between drug use and harm. See *id.* at 1399-1400 (Scalia, J., dissenting) (emphasis in original) ("What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horrors actually occurred"). The majority answered this objection by comparing the Customs Service testing program to suspicionless searches of passengers and carry-on luggage at airports, where searches are justifiably undertaken to prevent *possible* harm. See *id.* at 1395 n.3.

91. *Id.* at 1387-88 ("The Commissioner stated his belief that 'Customs is largely drug-free,' but noted also that 'unfortunately no segment of society is immune from the threat of illegal drug use.'").

92. *Id.* at 1397

93. *Id.* at 1395 ("Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem").

94. This is not to belittle the government's concern about the dangers of drug use in the U.S. Customs Service. In the dangerous, high stakes world of drug smuggling, drug impairment could have devastating consequences. Some of the harms that the Customs Service hoped to prevent by testing, such as fatal accidents and bribery of drug enforcement agents, had in fact occurred; they were just not demonstrably drug-related. *Id.* at 1392. This was not a problem for the majority, however, which spoke of the *possibility* of harm should targeted employees be impaired by drugs. See *id.* at 1393.

The Court would probably also require some showing that the drug testing program attempted to protect an employee's privacy as much as possible. See, e.g., *Skinner*, 109 S. Ct. at 1418 (discussing the fact that the FRA urine testing procedures did not require the presence of a monitor and were performed in a medical environment).

The third important difference between *Skinner* and *Von Raab* is the number of dissenting Justices in each case. Seven Justices comprised the majority in *Skinner*, while the Court split five to four in *Von Raab*.<sup>95</sup> The dissents in both cases criticized the majority's abandonment of the fourth amendment requirements of probable cause, but in *Von Raab* the dissenters also decried the lack of data on drug use and resulting harm. As Justice Scalia wrote:

I joined the Court's opinion [in *Skinner*] because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely.<sup>96</sup>

That four of nine Justices were unable to justify drug testing in *Von Raab* suggests that, absent overriding evidence of drug use and resulting serious harm, the government may have trouble mustering a majority of the Court to uphold some drug testing schemes in the future. However, the recent resignation of Justice Brennan and the subsequent appointment of David Souter could also cause the balance to tip the other way.

The implications of *Skinner* and *Von Raab* for a welfare recipient challenging a drug testing statute are contradictory. On the one hand, the *Von Raab* expansion of classes appropriate for drug testing suggests that the Supreme Court meant for the holding to be broadly interpreted. After all, much of human behavior can be potentially harmful, particularly when that behavior is affected by drugs, and the majority did not take issue with Justice Scalia's characterization of the *Von Raab* holding's scope. If the potential harms resulting from welfare recipient drug use—for example, increased crime, danger to welfare children and chronic welfare dependency—can be powerfully portrayed, the Court might find the government interest sufficiently compelling to justify drug testing.

On the other hand, the Court's assertion that employees in regulated industries have a diminished expectation of privacy, and therefore, can expect to be drug tested, hardly holds true in the welfare context. Welfare recipients are not employees in a regulated industry and are entitled to the same privacy expectations as all other private citizens. They differ from their fellow Americans only in their receipt of government subsistence benefits. Additionally, the dissent in *Von Raab* found the data on drug use among customs employees and on the link to resulting harm wholly inadequate. This judgment suggests that the government would need to present hard data on the extent of drug use among welfare recipients and the

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95. Justices Marshall and Brennan dissented in *Skinner*. 109 S. Ct. at 1422. Justices Marshall, Brennan, Scalia and Stevens dissented in *Von Raab*. 109 S. Ct. at 1398.

96. *Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting).

corresponding nexus between recipient drug use and grave harm to society for some of the Justices, perhaps a majority of them, to be satisfied.<sup>97</sup>

The initial message of *Skinner* and *Von Raab* is that, given a compelling government interest, the Supreme Court is willing to uphold drug testing of some government beneficiaries. The question, then, is whether the Court would uphold drug testing of those who receive that government benefit which most resembles charity—welfare. An analysis of the constitutional claims available to a welfare recipient facing a drug testing statute will suggest some possible outcomes.

### III. CONSTITUTIONAL CLAIMS AVAILABLE TO A WELFARE RECIPIENT CHALLENGING A DRUG TESTING PROGRAM

#### A. *Equal Protection Claims*

The equal protection clause of the fourteenth amendment provides that the government shall not deny any person the equal protection of the laws.<sup>98</sup> The Supreme Court has interpreted this clause to require that even though statutes must classify, they may not use classifications that do not serve the statutory objective.<sup>99</sup> In addition, classifications that rationally serve a statutory objective, but implicate a suspect or disfavored class of people, will be presumed invalid unless the state can show an overriding governmental interest. A welfare recipient subject to a mandatory drug test might have a defensible claim under this provision, if the petitioner framed her challenge as one of unequal treatment of welfare recipients versus non-recipients.<sup>100</sup>

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97. Published data on drug use among welfare recipients is nonexistent. The National Clearinghouse for Alcohol and Drug Information's four data bases turned up nothing on the subject. Phone conversation with the National Clearinghouse for Alcohol and Drug Information, Office of Substance Abuse Prevention, Oct. 9, 1990. Additionally, the harm to society stemming from any welfare recipient drug use is hard to quantify. The most striking harm would be drug-related criminal activity. This activity would include both drug offenses (buying or selling drugs) and non-drug offenses (crimes committed by drug users). However, criminal justice experts cannot agree on whether there is a causal relationship between drug use and crime. See Weissman, *supra* note 52, at 72 ("The lay public continues to support the notion that drug use and crime are inextricably intertwined in a singular and pernicious relationship. That assessment is premature and perhaps incorrect"); see also Gould, *supra* note 52, at 57-58, 67 (discussing the relationship between drug use and crime). Ultimately, data linking drugs and crime to welfare recipients might be unnecessary. See *Von Raab*, 109 S. Ct. at 1400 (Scalia, J., dissenting) ("Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it").

98. U.S. CONST. amend. XIV, § 1.

99. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1440 (1988).

100. The class of non-recipients would include people who receive government benefits that are not technically welfare, for example, social security, disability and veterans benefits, as well as people who do not qualify for government benefits at all. The recipient would have to characterize a challenge in this fashion because a welfare drug testing statute would probably require testing of all welfare recipients, thereby precluding a claim that some recipients were treated differently from others.

The level of scrutiny used by the Supreme Court virtually determines the outcome of a case.<sup>101</sup> The Court applies one of three different levels of scrutiny in equal protection cases. The most exacting standard is strict scrutiny, which is triggered when a petitioner belongs to a suspect class or when a fundamental right is implicated.<sup>102</sup> Intermediate level scrutiny is invoked in cases involving "quasi-suspect classes."<sup>103</sup> The final, and most lenient, standard is rational basis review, which requires only that a statutory classification be rationally related to a legitimate goal.<sup>104</sup> The Court has traditionally employed the rational basis standard of review in equal protection claims in welfare benefits cases. This most deferential approach grants legislatures wide latitude in designing welfare laws and makes equal protection claims very difficult for recipients to sustain.

The leading case on rational basis review in welfare benefits cases is *Dandridge v. Williams*.<sup>105</sup> In *Dandridge*, the state of Maryland used a "maximum grant regulation" to limit the amount of money any AFDC family could receive.<sup>106</sup> The maximum grant method did not take family size into account, with the result that larger families received less money per child than smaller families. Large-family recipients sued Maryland under the Social Security Act and the equal protection clause. In applying a rational basis standard<sup>107</sup> and finding against the AFDC families, the Supreme Court said, "We do not decide today that the Maryland regulation is wise . . . [b]ut the Constitution does not empower this Court to second-

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101. This is so because the burden of proof shifts. In rational basis review, the Supreme Court presumes that a government act is valid unless the claimant can prove otherwise. Under a strict scrutiny standard, however, the Court presumes the opposite, that the government act is invalid unless the state can prove otherwise.

102. L. TRIBE, *supra* note 99, § 16-6, at 1451-54 (discussing strict scrutiny). A suspect class is one generally considered to be a minority. The Court has so far limited the classification to racial and ancestral groups. *Id.* § 16-13, at 1465; *see also* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (citing race, alienage and national origin as triggering strict scrutiny).

The Court has declared only three rights to be fundamental and therefore deserving of strict scrutiny. These rights are the right to interstate travel, the right to vote and the right to equal litigation opportunities. *See* L. TRIBE, *supra* note 99, § 16-33, at 1610 n.2. The fundamental rights doctrine does not apply in the case of a welfare petitioner challenging a drug test.

103. L. TRIBE, *supra* note 99, § 16-3, at 1445 (discussing intermediate scrutiny); *see also* *Kadmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2487 (1988) (intermediate scrutiny not invoked in a case challenging a statute permitting some school districts to charge user fees for bus transportation). Intermediate review "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy." *Id.* Although the Court will only admit to expressly applying intermediate scrutiny when gender and illegitimacy are involved, some other cases purporting to apply rational basis review bear a remarkable similarity to the intermediate scrutiny line of cases. *See, e.g., Cleburne*, 473 U.S. 432 (a zoning ordinance applied to a home for the mentally retarded struck down).

104. L. TRIBE, *supra* note 99, § 16-2, at 1439-40 (discussing rational basis review).

105. 397 U.S. 471 (1970).

106. *Id.* at 473.

107. *Id.* at 485.



guess state officials charged with the difficult responsibility of allocating limited public welfare funds<sup>108</sup>

The Court has displayed some reluctance to apply this precedent in cases where the challenged law threatened complete denial of benefits.<sup>109</sup> Even in *Dandridge* the Court admitted that it recognized the enormous difference between welfare claims and the average economic regulation cases to which the rational basis standard normally applied.<sup>110</sup> However, persuading the Court to invoke intermediate scrutiny in a welfare case poses problems.

To qualify for the intermediate level of scrutiny, claimants must belong to a disfavored class. The Court has articulated at least three factors which qualify a class for disfavored status: (1) the group has suffered some moderate discriminatory treatment and is politically powerless, (2) the classification stereotypes in a fashion that inaccurately portrays the group's abilities or (3) the group possesses a personal trait over which it has no control.<sup>111</sup> So far the Court has limited intermediate scrutiny to cases involving discriminatory classifications based on gender and illegitimacy.<sup>112</sup>

*Plyler v. Doe*<sup>113</sup> is one exception. In *Plyler* the Supreme Court explicitly applied intermediate scrutiny to a case involving neither gender nor illegitimacy, but rather, denial of public education to children of illegal aliens.<sup>114</sup> The unique circumstances of the case led the Court to apply heightened scrutiny because of the claimants' status as minor children of disadvantaged illegal aliens and because of the importance of the interest in education.<sup>115</sup> Arguably, this combination of disfavored status, the well-being of welfare children and the importance of the threatened interest could trigger heightened scrutiny in a case where welfare benefits are denied based on drug testing.

108. *Id.* at 487

109. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (food stamps); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973) (food stamps); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (public assistance). In each case the Court applied the rational basis standard to laws that terminated benefits entirely and found the statutes irrational and unconstitutional. Additionally, the Court has admitted that whether or not there is complete deprivation of benefits is a factor to consider. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 20-23 (1972). In *Rodriguez*, the Court noted:

The individuals who constituted the class discriminated against in our prior cases were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of that benefit.

[A]ppellees [have not] addressed the fact that lack of personal resources has not occasioned an absolute deprivation of the desired benefit.

*Id.*

110. *Dandridge*, 397 U.S. at 485.

111. L. TRIBE, *supra* note 99, § 16-33, at 1613-15.

112. See *supra* note 103.

113. 457 U.S. 202 (1982).

114. *Id.* at 222-24.

115. *Id.* at 223.

First, *Plyler* found that aliens in general, while not constituting a "suspect class," belonged to an underclass created by the government's failure to bar alien entry into the country.<sup>116</sup> The Court then determined that the children of such aliens were innocent victims and should not be punished for the illegal behavior of their parents.<sup>117</sup> If a welfare recipient facing a drug test characterized the situation not as a question of one welfare recipient compared to another recipient, as in *Dandridge*, but as a question of unequal treatment of a welfare recipient compared to a non-recipient, the petitioner could make a similar argument for heightened scrutiny.

The petitioner could argue that the government is impermissibly classifying only people who are eligible for welfare as "testable," thereby subjecting the poor to the indignities of a drug test and infringement of their constitutional rights<sup>118</sup> while allowing the rich to avoid the intrusion altogether. Recipients could not rely solely on the argument that they were members of a disfavored underclass of poor people because the Supreme Court has consistently held that poverty alone does not create a suspect class.<sup>119</sup> Nevertheless, recipients could use *Plyler* to argue that their economically disadvantaged status, *combined with other factors*, requires a stricter level of scrutiny. And at least AFDC recipients could contend that the primary purpose of the welfare program is to help needy children<sup>120</sup> who should not suffer for their parents' sins.<sup>121</sup>

The *Plyler* Court also determined that although education was not a fundamental right, its denial to the plaintiffs would "mark them for the

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116. *Id.* at 218-19.

117. *Id.* at 220.

118. In this case, the rights arguably infringed are the fourth amendment right to be free from unreasonable searches and the right to privacy.

119. Past claimants have argued for strict scrutiny in cases involving the underprivileged. The Court has repeatedly declined to admit that poverty creates a suspect, or even a quasi-suspect class. See, e.g., *Kadrmas*, 108 S. Ct. at 2487 (emphasis added) ("We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny."); *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.").

120. See, *Cotter*, *supra* note 20, at 15-16. The purpose of the AFDC program is obvious, considering that only adults with children are eligible for benefits.

121. The claimants in *Plyler* were the children themselves, and the use of intermediate scrutiny was based, in part, on the immutability of the claimants' status as *minor children* of illegal aliens. The Court stated that the children's parents would not have had so strong a case. *Plyler*, 457 U.S. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)) ("Their 'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'"). The implications of this reasoning for recipients challenging a drug testing statute are unclear. Since only the parents of AFDC children are likely to be tested under such a statute, only the parents could claim direct injury. The parents would then have to argue that their children, who are immutably minors, would bear the brunt of the denial.

rest of their lives and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."<sup>122</sup> This language is remarkably similar to the language used by the Court in *Goldberg v. Kelly*<sup>123</sup> to justify extending due process protection to welfare beneficiaries.<sup>124</sup> Thus, a recipient facing denial could argue that the interest in welfare is equally as important, if not more so, than the interest in education in *Plyler* and, therefore, favors use of intermediate scrutiny. Although the Court has thus far refused to extend the *Plyler* holding beyond the "'unique circumstances'"<sup>125</sup> that provoked its "'unique confluence of theories and rationales,'"<sup>126</sup> a welfare drug testing scenario seems to present just the set of circumstances that compels the *Plyler* approach.

The arguments in favor of some form of heightened scrutiny are potent. Nevertheless, neither intermediate nor strict scrutiny can guarantee a petitioner a victory; the standards only make it harder for the government to prove that its interest supercedes the interest of the recipient.<sup>127</sup> In the case of a welfare statute prescribing drug testing, the combination of interests in fiscal conservation, avoiding welfare fraud,<sup>128</sup> eliminating welfare dependency and curbing drug use and crime could conceivably be compelling enough to justify the invasion of a recipient's fourth amendment rights, regardless of the level of scrutiny applied.

Irrespective of the levels of scrutiny, the criterion of drug use as the basis for denying subsistence benefits suggests another equal protection claim available to a welfare recipient. The argument would run as follows: the primary purpose of a welfare statute is to provide aid to the poor based on need. Therefore, although a welfare statute may classify American citizens as welfare-eligible or non-eligible based on need, it cannot base those classifications on a criterion like drug use or addiction, which is

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122. *Plyler*, 457 U.S. at 223.

123. 397 U.S. 254 (1970).

124. In *Goldberg*, the Court stated:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

*Id.* at 265.

125. *Kadrmas*, 108 S. Ct. at 2488 (quoting *Plyler*, 457 U.S. at 239 (Powell, J., concurring)).

126. *Id.* (quoting *Plyler*, 457 U.S. at 243 (Burger, J., dissenting)); see also Comment, *Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence*, 132 U. PA. L. REV. 1547 (1984) (arguing that intermediate scrutiny ought to be extended in appropriate cases).

127. See *supra* note 101 and accompanying text.

128. Welfare fraud in this context would be the use of welfare money to purchase illegal drugs.

unrelated to need.<sup>129</sup> This line of reasoning would not depend on whether the Court applied heightened scrutiny because it argues that even under the lowest level of scrutiny, the statutory classification is not rationally related to a legitimate goal.<sup>130</sup>

The Supreme Court has already addressed the issue of unconstitutional treatment of drug addicts. In *Robinson v. California*,<sup>131</sup> the Court struck down a California statute which made it a crime for an individual to be addicted to the use of narcotics. The Court wrote:

[W]e deal with a statute which makes the "status" of narcotic addiction a criminal offense . . . It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . .<sup>132</sup>

The criminal nature of the California statute in *Robinson* distinguishes it from a welfare drug testing statute, and the sanction of ninety days in prison probably influenced the Court. Justice Stewart wrote, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."<sup>133</sup> Nevertheless, the concept of penalizing someone in *any* fashion for having a disease was what really bothered the Court, and the case of a welfare recipient denied benefits because of drug addiction should engender similar distaste. After all, punishment can take a variety of forms. An imprisoned addict would at least have had food, shelter and clothing. A terminated welfare recipient would be deprived of the means to survive.

This argument rests, however, on blurring the distinction between one who is addicted to drugs and one who has committed the act of using drugs. The statute in *Robinson* was invalidated because it punished people for the status of being addicted. In *Powell v. Texas*,<sup>134</sup> however, the Supreme

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129. Recipients could also allege that welfare drug testing statutes are racially motivated. Numerous conversations have convinced me that there is a widespread and partially misguided belief that most welfare recipients and drug addicts belong to minority groups. However, statistics indicate otherwise. For example, 52% of AFDC recipients in 1980 were white. T. JOE & C. ROGERS, *BY THE FEW FOR THE FEW* 24 (1985). While concrete evidence of improper racial motivation may be hard to pin down, some evidence can be found. For example, Louisiana State Representative David Duke, who proposed the Louisiana drug testing statute for welfare recipients, is a former member of the Ku Klux Klan. Although Duke continues to deny that he is affiliated with the Klan, his legislative office in New Orleans, Louisiana is also the headquarters for the National Association for the Advancement of White People (NAAWP).

130. However, there is also a possible argument for intermediate scrutiny based on the contention that drug addicts possess a personal trait over which they have no control. See *supra* note 111 and accompanying text. The trait is the disease of addiction.

131. 370 U.S. 660 (1962).

132. *Id.* at 666.

133. *Id.* at 667.

134. 392 U.S. 514 (1968).

Court upheld a statute which criminalized public drunkenness. In denying the applicability of *Robinson*, the *Powell* majority explained that *Robinson* was limited explicitly to cases where "no conduct of any kind is involved," and did not apply when the state was attempting to punish conduct.<sup>135</sup> Thus the claimant in *Powell* was permissibly punished for committing the act of public intoxication. The fact that he was an alcoholic did not erase his culpability for the punishable conduct.

In light of *Powell*, the success of the *Robinson* argument depends on persuading the Court that this status versus conduct dichotomy is ill-conceived. Justice White's concurring opinion in *Powell* offers a roadmap:

If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law.<sup>136</sup>

If the Justices were to be convinced by this argument, then ultimately, the Court would have to decide if a welfare statute can constitutionally discriminate on the basis of an acknowledged physical condition (drug addiction involving active drug use) "which may be contracted innocently or involuntarily."<sup>137</sup>

### *B. Unconstitutional Conditions Claims*

One constitutional claim available to a recipient challenging a welfare drug testing program is not tied to any single clause in the Constitution. The doctrine of unconstitutional conditions states that, although the government may withhold a benefit altogether, it may not grant the benefit on the condition that the recipient waives an independent constitutional right.<sup>138</sup> This theory, that the greater power to deny does not always include the lesser power to condition, originated in cases of foreign corporations attempting to do business in the United States.<sup>139</sup> In recent times, the doctrine

135. *Id.* at 542.

136. *Id.* at 548 (White, J., concurring) (citation omitted).

137. *Id.* at 567 n.29; see also *id.* at 667 n.8 (quoting *Linder v. United States*, 268 U.S. 5, 18 (1925)) ("Thirty-seven years ago this Court recognized that persons addicted to narcotics 'are diseased and proper subjects for [medical] treatment.'").

138. For exhaustive treatments of the doctrine, see Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV L. REV. 5 (1988); Sullivan, *Unconstitutional Conditions*, 102 HARV L. REV. 1415 (1989); and *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989). For a discussion of the doctrine's usefulness in the welfare context, see O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

139. See, e.g., *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926); see also O'Neil, *supra* note 138, at 456-57.

has been invoked with little or no consistency in the context of personal liberties. In some cases where an unconstitutional condition was alleged, the Supreme Court concluded that the conditions did indeed improperly infringe on constitutional guarantees like the rights to speech and religion.<sup>140</sup> In other equally plausible cases, however, the Court categorically rejected the notion that any right was infringed.<sup>141</sup>

The schizophrenic attitude of the Court towards unconstitutional conditions makes it a difficult doctrine on which to rely. Yet the doctrine is suited to the case of welfare recipients faced with choosing between a drug test and their welfare benefits. The government proffers a benefit that is not constitutionally required, conditioning the offer on recipients waiving their right to be free from unreasonable searches by undergoing mandatory drug tests. Because the government could not constitutionally force the same recipients to submit to drug tests without a compelling reason if they were *not* in line for the benefits, it cannot compel the recipients to submit to tests merely because they *are* in line for the benefits.

There are several useful examples of the unconstitutional conditions doctrine at work in cases concerning public assistance claims. In *Wyman v. James*,<sup>142</sup> the Supreme Court rejected the argument that a statute requiring a home visit for continuation of AFDC benefits imposed an unconstitutional condition on a welfare recipient by compelling her to relinquish her fourth amendment guarantee against unreasonable searches. The Court reasoned that home visitation did not constitute a search, especially because the visit was not "forced or compelled" and the recipient could withhold her consent.<sup>143</sup> The Court went on to argue that even if the home visit had constituted a search, the intrusion was not unreasonable.<sup>144</sup>

The *Wyman* holding simultaneously raises and lowers the hopes of a welfare recipient challenging a drug testing program. It raises hopes because, unlike the home visits in *Wyman*, drug tests have already been called searches by the Supreme Court.<sup>145</sup> Thus, an unconstitutional conditions

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140. See *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) (speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (religion).

141. See *Lyng v. International Union, UAW*, 485 U.S. 360 (1988) (ability of employees and their families to qualify for federal aid while striking); *Harris*, 448 U.S. 297 (ability of the poor to use federal aid to pay for abortions).

142. 400 U.S. 309 (1971).

143. *Id.* at 317.

144. *Id.* at 318. Some of the legitimate government purposes that made the search reasonable were: (1) assuring the protection of dependent welfare children, (2) seeing that public funds were reaching the intended recipients and were being properly used, (3) helping to attain federal relief objectives, (4) assuring the beneficiary's privacy by getting information directly from the recipient instead of using private records and (5) obtaining essential information not available elsewhere. *Id.* at 318-22.

145. See *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1413 (1989); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989).

challenge to drug testing should not be rejected on the grounds that the administrative tool at issue did not fall within the scope of the fourth amendment. It lowers hopes because the Court stated that the *Wyman* claimant was not in any way coerced; rather, she was perfectly free to deny permission for the visit. That choosing to forego the visit meant loss of her benefits did not make the choice any less free. The Court could easily recycle this argument in a drug testing case, saying that a welfare recipient may opt to refuse a drug test, and that the resulting denial of benefits does not restrict his or her freedom of choice. A drug test, however, is arguably more intrusive than the home visit prescribed in *Wyman*,<sup>146</sup> and if so, could make the choice between condition and denial of benefits more onerous. In addition, the home visit in *Wyman* was directed only towards achieving the purposes of a child-welfare program, while drug testing is aimed at a separate social problem.

A more recent case, *Lyng v. International Union, UAW*,<sup>147</sup> involved a 1981 amendment to the Food Stamp Act. *Lyng* highlights several other strands of unconstitutional conditions jurisprudence. The amendment provided that a household could not become eligible for food stamps if one of its members was on strike, and that a household food stamp allotment could not increase because a striking member's income declined.<sup>148</sup> Several unions challenged the amendment, claiming that it unconstitutionally infringed on union members' first amendment rights to association and expression.<sup>149</sup>

In the right to association claim, the unions first argued that the statute would prevent household members from dining together by encouraging strikers to leave so that a household's food stamp allotment might increase. The Supreme Court denied this claim on the basis that it was "'exceedingly unlikely' that [the amendment would] 'prevent any group of persons from dining together.'"<sup>150</sup> The Court determined that the statute would probably have no effect at all.<sup>151</sup> The unions also claimed that the amendment

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146. Compare *Skinner*, 109 S. Ct. at 1412-13 with *Wyman*, 400 U.S. at 318-22. The circumstances in *Skinner* and *Von Raab* seem to offer an opportunity for an unconstitutional conditions argument; however, the issue was never raised in those terms. Epstein maintains that the doctrine does not really apply to drug testing in the employment context:

The use of drugs is related to performance on the job, and private firms insist on similar conditions. The conditions imposed do not seek to constrain private practices and relations of employees that are unrelated to their employment. Nor do these cases involve the hypothetical danger of the government using taxpayer money generally to pay people to release their fourth amendment rights in general.

Epstein, *supra* note 138, at 70.

147. 485 U.S. 360 (1988).

148. *Id.* at 363 n.2.

149. *Id.* at 363.

150. *Id.* at 365 (quoting *Lyng v. Castillo*, 477 U.S. 635 (1988)).

151. *Id.*

infringed on their members' rights to associate with each other in pursuit of union goals. The Court rejected this contention for substantially the same reasons, declaring that the statute did not prevent union members from associating together.<sup>152</sup> Finally, the Court answered the right to expression claim by saying that the statute did not "coerce" any belief or require support of any particular political activities or views.<sup>153</sup>

The Court's reasoning in *Lyng* identifies several arguments that might frustrate a welfare recipient's unconstitutional conditions challenge to a drug testing scheme. First, the challenged government action does not "prevent" or directly and substantially interfere with the exercise of the right. Certainly the Court could argue that a drug test does not prevent a recipient from remaining free from unreasonable searches; he or she may remain "unsearched" and simply relinquish the welfare payments. The recipient might counter this claim by arguing that the strikers in *Lyng* were unable to receive a government benefit *if* they did something that was *optional*, while the welfare recipients would be unable to receive the government benefit *unless* they did something that was *mandatory*. When the issue is framed in this fashion, the element of coercion in the latter case seems much more profound; the restriction of choice is somehow more threatening. Nevertheless, the usefulness of this comparison for a recipient depends entirely on the Court's assumptions about the recipient's options and the seriousness of the alleged infringement.<sup>154</sup>

Additionally, the Court might contend that since the welfare recipient can refuse the drug test, the statute does not directly or substantially interfere with the recipient's fourth amendment rights. This argument is flawed. The Court in *Lyng* found that the rights to association and expression were not significantly affected. In the case of drug testing, however, the Court has already declared drug tests to be infringements on the fourth amendment right; the question for the Court, then, is not whether a right has been burdened, but instead, whether the government may bargain for this right by dangling a very tempting carrot.

Perhaps rethinking this approach in terms of bargaining is most helpful. The bargains in *Lyng* and *Wyman* arguably did not require the recipients of the benefits to make wrenching choices; the infringement of the rights they alleged were somehow bearable, not deeply intrusive. Therefore, perhaps the government's proposed bargains were acceptable—a fair price for

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152. *Id.* at 366.

153. *Id.* at 369.

154. The recipient's reasoning, for example, presumes that a union member may freely choose not to strike. The Court might disagree. In fact, the Justices might set up a different comparison. If strikers refuse to work, they are denied food stamps; if welfare recipients refuse to be drug tested, they are denied benefits. In either case, the potential recipient has an option. And, of course, the ultimate and determinative assumption is that one option, either crossing the picket line or undergoing a drug test, is more onerous than the other.



a fair purchase. For a welfare recipient to undergo procurement and analysis of his or her bodily fluids, however, is *corporally* intrusive. The government's offer may demand too high a price.

### C. Due Process Claims

Due process protects constitutionally recognized property and liberty interests from unreasonable intrusion by the state. Over the years, the due process doctrine has developed procedures to insure that invasions of private interests are in fact legitimate. In the context of drug testing of welfare recipients, a due process claim would not focus on the government's right to test recipients or ultimately take their property, but rather, would arise in a challenge to the denial process after testing had occurred.

At the least, a recipient would be entitled to minimum procedural standards to substantiate that he or she was in fact involved with drugs and otherwise fit the statutory criteria for denial. At the most, a claimant would be entitled to extensive procedural protection.<sup>155</sup> If a statute conditioning subsistence benefits upon drug use failed to provide certain procedures, a due process claim might arise.

The Supreme Court would not approach such a claim *tabula rasa*. Since the 1970 decision in *Goldberg v. Kelly*,<sup>156</sup> the Court has employed a two-step test when analyzing procedural due process claims. The Court asks first if there is a protected property or liberty interest implicated, and second, if so, what process is due?<sup>157</sup> Doctrines that have developed to inform the two inquiries can be slippery, but understanding them is essential to analysis of what kinds of procedures are due drug-tested welfare recipients.

The first inquiry is whether there is a protected property interest. Originally the Court made this determination in government benefits cases based

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155. Generally, due process protection before deprivation of a property or liberty interest has come to mean some form of hearing. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) ("The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."). Judge Friendly lists eleven elements of a fair trial that judges commonly consider when deciding what procedures are warranted: (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) an opportunity to present reasons why the proposed action should not be taken, (4) the right to call witnesses, (5) the right to know the evidence against one, (6) the right to have the decision based only on the evidence presented, (7) the right to counsel, (8) the making of a record, (9) a statement of reasons, (10) public attendance and (11) judicial review. See Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1279-95 (1975). The Supreme Court has determined that termination of welfare benefits requires a pre-termination hearing. See *infra* notes 163-66 and accompanying text for a discussion of this issue.

156. 397 U.S. 254 (1970).

157. The two-step analysis first used in *Goldberg* was not explicitly acknowledged as such until 1972 in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

on a right-privilege distinction. The distinction was perhaps most succinctly stated by Justice Holmes in *McAuliffe v Mayor of New Bedford*.<sup>158</sup> In denying the petition of a policeman fired for violating a regulation that restricted officers' political involvement, Holmes said, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>159</sup> Holmes added that the petitioner "cannot complain, as he takes the employment on the terms which are offered him."<sup>160</sup> Holmes thus neatly divided the universe of government benefits in halves, one half being constitutionally protected rights and the other government-bestowed privileges ineligible for procedural due process safeguards.

The right-privilege dichotomy was used repeatedly over the years to defeat due process claims of impermissible government encroachment upon private interests.<sup>161</sup> By the early 1970s, however, the Supreme Court had largely abandoned the distinction in favor of a new "entitlement" theory of constitutionally protected interests.<sup>162</sup> The roots of the entitlement theory can be found in *Goldberg*,<sup>163</sup> a case generally regarded as the apex in the Supreme Court's expansion of due process protection of government "privileges." *Goldberg* held that welfare recipients were entitled to due process protection, and should be given a hearing prior to termination of benefits.<sup>164</sup> Justice Brennan wrote for the Court, "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. . . . The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege and not a right.'"<sup>165</sup> The Court, in fact, practically assumed that welfare benefits were a protected property interest and that the real issue was "what process is due?"<sup>166</sup>

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158. 155 Mass. 216, 29 N.E. 517 (1892).

159. *Id.* at 220, 29 N.E. at 517.

160. *Id.* at 220, 29 N.E. at 518.

161. One scholar shepardized *McAuliffe* and found more than 70 cases, 77% of which used the right-privilege distinction to deny due process protection. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1441 n.7 (1968).

162. See *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (footnote omitted) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); see also *id.* at 571 n.9 (discussing the history of the right/privilege dichotomy). Whether or not the Court has actually abandoned the right-privilege distinction is a topic of some discussion. The replacement doctrine of the "entitlement" theory has evolved into something quite similar to the distinction. See Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 69 (1982). Smolla remarks on "[t]he almost schizophrenic tendency of the Court to simultaneously disclaim the [right-privilege] doctrine by name and resort to the concept in practice" *Id.* at 70.

163. *Goldberg*, 397 U.S. 254.

164. *Id.* at 270-71.

165. *Id.* at 262.

166. In an opinion spanning sixteen pages, Justice Brennan used only one of those pages to decide whether welfare benefits qualified as property. *Id.* at 262 n.8 ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"). The *Goldberg*

The Court elaborated on the entitlement theory in *Board of Regents v Roth*,<sup>167</sup> stating that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."<sup>168</sup> Ironically, the entitlement theory articulated in *Goldberg* to extend due process protection to a government benefit was then used in *Roth* and subsequent cases to deny procedural due process protection.<sup>169</sup> In fact, the Court took the theory to its logical conclusion in *Arnett v Kennedy*,<sup>170</sup> where the Justices denied due process protection, declaring that a substantive entitlement was actually defined by its accompanying statutorily ordained procedures and that a claimant must take the "bitter with the sweet."<sup>171</sup>

The *Arnett* argument, however, was categorically rejected in *Cleveland Board of Education v Loudermill*.<sup>172</sup> Justice White wrote, "'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee . . .'"<sup>173</sup>

*Loudermill* remains the Court's most recent pronouncement on the entitlement issue. Although the entitlement theory began in *Goldberg* as a liberating concept designed to expand due process protection, later cases

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Court then decided that the required pre-termination procedures and hearing must include: (1) timely and adequate notice specifying reasons for the termination, (2) an opportunity to confront adverse witnesses and present arguments and evidence before the judge, (3) the right to retain counsel, (4) a statement of reasons for the decision and the evidence relied upon and (5) an impartial decision-maker. *Id.* at 266-71.

167. 408 U.S. 564 (1972).

168. *Id.* at 577.

169. See, e.g., *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (a life inmate refused a sentence commutation by a parole board was not entitled to a written statement of the reasons for the decision); *Meachum v. Fano*, 427 U.S. 215 (1976) (the transfer of unruly prisoners from a minimum to a maximum security facility did not require a pre-transfer hearing); *Bishop v. Wood*, 426 U.S. 341 (1976) (a police officer was not entitled to a pre-termination hearing); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (a civil service employee was not entitled to a pre-termination trial-type hearing). The Court's reasons for curbing the "due process explosion" occasioned by *Goldberg* and its progeny are hard to fathom. One commentator has suggested that the Court was exhibiting a new attitude of "judicial federalism," which favored shifting the responsibility for defining due process norms to other branches of government. See Smolla, *supra* note 162, at 88-89. But cf. *Vitek v. Jones*, 445 U.S. 480 (1980) (the transfer of a prisoner to a mental hospital infringed on a protected liberty interest); *Morrissey*, 408 U.S. 471 (revoking parole deprived the petitioner of a liberty interest).

170. 416 U.S. 134 (1974).

171. The *Arnett* holding came to be called "the bitter with the sweet" argument because of Justice Rehnquist's assertion that, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.* at 153-54.

172. 470 U.S. 532 (1985).

173. *Id.* at 541 (quoting *Arnett*, 416 U.S. at 167).

like *Roth* have made it a double-edged sword. Nevertheless, *Goldberg* still stands and welfare benefits should therefore still be defined as entitlements triggering due process safeguards.<sup>174</sup>

Assuming the Court decided that recipients have a property interest in welfare, the second question remains—what process is due? The Court crystalized its approach to this inquiry in *Mathews v. Eldridge*,<sup>175</sup> a case involving whether a recipient of Social Security disability benefit payments was entitled to a pre-termination evidentiary hearing. In denying the recipient's claim the Court stated:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>176</sup>

*Mathews* set out a calculus similar to the balancing test applied earlier in *Goldberg*. The *Goldberg* Court reached the conclusion that a pre-termination

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174. Although it is true that the Court has never declared subsistence benefits to be "property rights" independent of their statutory foundation, Tribe maintains that *Goldberg* cannot be properly explained except in terms of establishing some substantive right to welfare. L. TRIBE, *supra* note 99, § 16-49, at 1644.

While the concept of statutory entitlement would seem logically to lead to due process protection for applicants as well as recipients, this has not been definitively decided. The Supreme Court has not yet addressed the issue of due process for general assistance applicants; however, three Justices have exhibited unwillingness to deny applicants the due process that recipients are afforded. In *Gregory v. Town of Pittsfield*, 470 U.S. 1018 (1985), Justices O'Connor, Brennan and Marshall dissented from a denial of certiorari in a case involving due process for a general assistance applicant. The Justices wrote:

The conclusion of the [Maine] Supreme Judicial Court that an applicant for general assistance does not have an interest protected by the Due Process Clause is unsettling in its implication that less fortunate persons in our society may arbitrarily be denied benefits that a State has granted as a matter of right. One would think that where state law creates an entitlement to general assistance based on certain substantive conditions, there similarly results a property interest that warrants at least some procedural safeguards. [T]he weight of authority among lower courts is contrary to the conclusion of the Supreme Judicial Court.

*Id.* at 1021.

This issue would have to be addressed in the case of a welfare statute prescribing drug testing. The problem is tangled. Would both recipients and applicants need to be tested? Do applicants have an entitlement or property interest in general assistance, and are they then entitled to the same, or less, due process protection than recipients? If both applicants and recipients are tested, and if both are afforded due process, will the administrative burden be unsupportable? And if applicants are denied the due process granted to recipients, will not governments have an incentive to keep applicants off the welfare rolls for as long as possible while they determine eligibility, since once the individual begins receiving payments, a hearing is required for termination? Justice Black argued this latter point in his *Goldberg* dissent. See *Goldberg*, 397 U.S. at 279 (Black, J., dissenting).

175. 424 U.S. 319 (1976).

176. *Id.* at 335 (citation omitted).

hearing was required by weighing the recipient's interest in uninterrupted receipt of benefits against the government's interest in procedural efficiency and fiscal conservation.<sup>177</sup> In doing so, the Court isolated welfare recipients from other petitioners seeking due process and offered them greater constitutional protection because of the seriousness of their potential loss. As Justice Brennan wrote for the Court:

Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee or virtually anyone else whose governmental entitlements are ended—is that termination of aid may deprive an *eligible* recipient of the very means by which to live while he waits.<sup>178</sup>

Since *Goldberg* remains good law, it is safe to assume that the recipient's interest is still paramount and would usually outweigh government efficiency concerns. Nevertheless, if the government interest were expanded to include the politically popular goal of eliminating drug abuse and its attendant misery from the welfare population, the Court might be persuaded to side against the welfare recipients.

Ultimately, a legislature attempting to condition welfare eligibility on drug use must keep *Goldberg* and *Mathews* in mind when drafting its statute. The state should theoretically offer every element of a fair hearing<sup>179</sup> to a threatened recipient to avoid as many termination errors as possible. Although this "cover all bases" approach might create an enormous administrative burden if a great number of affected recipients appealed termination decisions, the importance of the property interest demands nothing less than that the state prove its case.<sup>180</sup> However, *Mathews* requires the Court to consider both the value of additional procedural safeguards and the resulting

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177. *Goldberg*, 397 U.S. at 262-65.

178. *Id.* at 264 (emphasis in original). Justice Black recognized the significance of this judgment for future welfare claimants in his dissent when he argued that such a balancing test would never permit the government interest to win. *Id.* at 278 (Black, J., dissenting) ("[A]s the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual.").

179. See *supra* note 155 for a list of the elements of a fair hearing.

180. The likelihood of a profusion of recipient suits is probably small. The *Goldberg* majority acknowledged that most benefits denials are not challenged. *Goldberg*, 397 U.S. at 265. Other commentators agree that disadvantaged members of society often do not use available procedures: See Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV C.R.-C.L. L. REV. 48, 67-69 (1976) (discussing the national welfare administration error rate of 37.9%, but a six-month appeals rate of only 2%); Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 784-85 (1974) (citing the same statistics as Rubenstein, but adding that in 1970 almost 50% of Social Security disability claims were rejected and only 11% requested hearings, and that the 2% nationwide appeals rate for denied public assistance claims rises to 6% when only terminations and denials are considered.).

fiscal and administrative burdens. Under this analysis, offering the full array of procedural safeguards might seem unwarranted.

### CONCLUSION

Few people would dispute that this country is experiencing a national drug crisis, and probably fewer still would champion a relaxed approach to solving the problem. The stakes are simply too high. The question, however, is how fierce a war we should wage. There seems now to be a preliminary answer. The President, Congress and the Supreme Court have all demonstrated their support for aggressive anti-drug tactics, and until the drug problem abates, there is no reason to believe they will diminish their efforts.

If the drug war is truly an all-out campaign, then we can expect an increase in the number of laws that prescribe drug testing. And since legislators have already attempted to condition welfare benefits on drug use and drug testing, welfare recipients are a likely target. While eradicating drug abuse from the welfare population is a worthy goal, achieving it by means of wholesale drug testing may exact an undesirable toll from society. Not only would we beget a caste of desperate, addicted individuals, but we would also undermine, perhaps irretrievably, our common belief in the inviolability of constitutional guarantees. Ultimately, the Supreme Court will likely be left to determine the proper balance between the cost of drugs to society and the price of encroaching on the rights of the citizenry.

